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## LAW PROFESSORS AND POLITICAL SCIENTISTS: OBSERVATIONS ON THE LAW/POLITICS DISTINCTION IN THE GUINIER/ROSENBERG DEBATE

ROBERT POST\*

Political scientists used to task law professors with naivety and idealism. They charged that legal scholars were beguiled by the fantasy that law was autonomous from politics. Political scientists believed that law was instead merely the continuation of politics by other means. The idea of a rule of law, the idea that the unique grammar of law might discipline political stratagem, was dismissed as the opiate of a self-serving legal profession.

Lani Guinier's concept of demospudence would seem immune from this longstanding political science critique. At the core of Guinier's concept of demospudence is the idea that law gains its legitimacy through democratic responsiveness.<sup>1</sup> Guinier does not imagine law as categorically distinct from ordinary politics; she sees it instead as a medium for the conduct of such politics. Guinier envisions law and politics as continuously in dialogue. Law inspires and provokes the claims of politically engaged agents, as it simultaneously emerges from these claims. That is why Guinier praises judges who "engage dialogically with nonjudicial actors and . . . encourage them to act democratically."<sup>2</sup> That is why she "focuses on the relationship between the lawmaking power of legal elites and the equally important, though often undervalued, power of social movements or mobilized constituencies to make, interpret, and change law."<sup>3</sup>

Implicit in this image of the relationship between law and politics is a particular conception of politics. Guinier's conception of politics is similar to that of Jeremy Waldron, who famously argues for legislative supremacy on the ground that politics is itself an arena in which actors argue about the meaning of principles, rights, and law.<sup>4</sup> Waldron's point is that if politics is a scene in

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<sup>1</sup> Lani Guinier, *The Supreme Court, 2007 Term – Foreword: Demospudence Through Dissent*, 122 HARV. L. REV. 4, 15-16 (2008).

<sup>2</sup> *Id.* at 50.

<sup>3</sup> *Id.* at 47.

<sup>4</sup> JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 156 (1999) (suggesting that many "legislative achievements claim[] authority and respect as law *in* the circumstances of politics, including the circumstance of disagreement"); JEREMY WALDRON, *LAW AND DISAGREEMENT* 159 (1999) [hereinafter WALDRON, *LAW AND DISAGREEMENT*] ("What is normally understood by politics is that it is an arena in which the members of some group

which agents debate the meaning of constitutional principles, and if the meaning of these principles should ultimately be determined by the agents who are to be bound by them, then the determination of these principles should not be delegated to a few unresponsive judges.<sup>5</sup> The content of these principles should instead emerge from genuine and comprehensive political dialogue and discussion.

Guinier offers a variant on this perspective. She agrees that the content of the constitutional principles ought to be democratically responsive, and she agrees that the meaning of constitutional principles are forged within the cauldron of political debate, but she conceives judges as actors within that debate.<sup>6</sup> In her view, courts do not end democratic debate about the meaning of rights and the law; they are participants within that debate.<sup>7</sup> Judicial review does not foreclose political dialogue but advances it.

How ironic, then, that in this symposium Gerald Rosenberg should resurrect the traditional political science indictment against Guinier. Rosenberg claims that Guinier is naïve, romantic, and idealistic.<sup>8</sup> Rosenberg believes that Guinier's failings exemplify those of the larger legal academy, which Rosenberg asserts is ingenuous and insular because it fails "to confront social science research."<sup>9</sup> Rosenberg speculates that the ostrich-like ignorance of law professors stems from their attempt to preserve the "status" associated with a "monopoly" on understanding the functioning of law.<sup>10</sup>

Rosenberg's charge is not the traditional one that the legal academy conceives law as an autonomous grammar of behavior. Rosenberg does not contend that Guinier is misled by a mirage of the "rule of law." He claims rather that legal scholarship is under the self-serving illusion that courts can meaningfully participate in the political debate in which legal principles are determined. Rosenberg accuses Guinier of being too "Court-centric" because she is in the grip of a "romanticized" "understanding of the role of the Court."<sup>11</sup>

Rosenberg insists first, that Guinier, like most legal scholars, fails to recognize that, "for decades social science researchers have repeatedly found that judicial opinions neither educate nor teach. Ordinary people do not know about them, are unlikely to find out about them, and are not interested."<sup>12</sup> He asserts, second, that "elites are seldom if ever motivated or inspired to act by

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debate and find ways of reaching decisions on various issues in spite of the fact that they disagree about the values and principles that the merits of those issues engage.").

<sup>5</sup> See WALDRON, *LAW AND DISAGREEMENT*, *supra* note 4, at 15.

<sup>6</sup> Guinier, *supra* note 1, at 121.

<sup>7</sup> *Id.* at 125.

<sup>8</sup> Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 575 (2009).

<sup>9</sup> *Id.* at 578.

<sup>10</sup> *Id.* at 578-79.

<sup>11</sup> *Id.* at 575.

<sup>12</sup> *Id.* at 564.

the language of judicial opinions. Rather, they are motivated by the substantive holdings of cases.”<sup>13</sup> Judicial opinions “are neither necessary nor sufficient for democratic deliberation.”<sup>14</sup> Rosenberg argues, third, that Guinier, like most legal scholars, “overstates the contribution of the Court to fostering democratic deliberation. . . . If scholars want to understand the capacity of the Justices to influence democratic deliberation, they need to focus on that deliberation and on social movements, not on the Court. Focusing only on the Court will inevitably overstate its role.”<sup>15</sup>

Many of Rosenberg’s arguments, it must be recognized, are directed against Guinier’s specific thesis that *oral* dissents are a particularly important way for Justices of the Supreme Court to influence democratic deliberation.<sup>16</sup> Although the Obama era is one in which the genre of oral eloquence has reclaimed its long-established prominence in American political culture, and although both England and America possess great traditions of memorable oral advocacy, it is nevertheless the case that oral *judicial* eloquence has never in the United States been an especially notable or influential genre. Guinier’s arguments in this regard are original and perhaps vulnerable to some of the empirical points that Rosenberg advances. But Rosenberg makes plain that he has bigger fish to fry. He wants to undermine the *generic* claim that court opinions, whether oral or written, contribute to democratic deliberation.<sup>17</sup> He appeals to “social science research” that purports to show that Supreme Court decisions have “no effect on the overall distribution of public opinion” and that most Americans cannot name opinions or correctly summarize their holdings.<sup>18</sup>

Rosenberg’s indictment requires us to understand what it means for political actors meaningfully to participate in political debate. The premise of Rosenberg’s attack seems to be that participation is significant only when its substance is widely known or only when it is a necessary or sufficient cause for measurable changes in public opinion.<sup>19</sup> There are common ways of understanding politics, however, in which such metrics are plainly immaterial.

How many Americans, for example, can identify Senator Orrin Hatch? How many can identify Representative Henry Waxman? How many Americans know what positions Hatch or Waxman take on different legislative issues? If it could be demonstrated that the views of Hatch and Waxman do not measurably change the content of public opinion, would it follow that only “romantic” or “insular” scholars would study their views? I think not. It is intelligible to believe that the significance of political actors such as Hatch and

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 567-73.

<sup>17</sup> *Id.* at 565-67.

<sup>18</sup> *Id.* at 565-66 (quoting Nathaniel Persily, *Introduction to NATHANIEL PERSILY, JACK CITRIN & PATRICK J. EGAN, PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 8 (2008)).

<sup>19</sup> *Id.* at 569.

Waxman is not exhausted by their name-recognition or by their measureable effects in altering the content of public opinion (or even discrete legislative outcomes).

Or, to take a different example, how many Americans can identify the platforms of the Republican or Democratic parties? Even if the numbers are astronomically small, far smaller than the number of Americans who can identify the content of *Roe v. Wade*, does it follow that the content of these platforms is unworthy of study? Does it follow that political actors who struggle to insert one or another plank in their party's platform are deluded and wasting their time? Every person literate in American politics can appreciate the sense in which those who seek to affect the content of party platform planks are meaningful participants in public deliberation, even if it can be shown that the content of party platforms is not well-known and even if the content of particular planks is neither a necessary nor sufficient condition for changes in public opinion or changes in the substance of law.

Underlying Rosenberg's attack on Guinier, and on legal scholarship generally, seems to be a very rigid set of presuppositions about the nature of politics. The social science research to which Rosenberg appeals seeks to mimic the natural sciences by reducing politics to a field of causes and effects.<sup>20</sup> It asks whether one quantifiable variable (e.g., court decisions) "causes" changes in a distinct quantifiable variable (e.g., public opinion). From the perspective of such a science, the only variables worth studying are those that can be demonstrated to possess causal efficacy. Rosenberg seems to assume that scholars who conceptualize politics in ways that are not reducible to this mechanical field of causes and effects are romantic and idealistic.<sup>21</sup>

Yet when we appreciate the significance of political actors like Hatch or Waxman, or the importance of those who struggle to determine the content of party platforms, we presuppose a conception of politics that is not reducible to such quantifiable variables. We express a perfectly ordinary understanding of politics as a scene in which public meaning is debated and created. The scholarship of Waldron flows directly from this understanding of politics.<sup>22</sup> Politics for Waldron is not about "causing" measurable changes in public opinion, but about an arena of debate and justification in which political actors together decide what is right. If political debate produced only outcomes that were the effects of identifiable and quantifiable causes, it could not normatively substitute for judicial review.

Like Waldron, Guinier also conceives of politics as more than a field of causes and effects. She portrays politics as an arena in which political actors debate with each other and with courts about what constitutional values ought to be embraced. It is not essential to Guinier's argument that courts "cause" changes in public opinion. It is only essential that courts are one voice within

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<sup>20</sup> *Id.* at 565-67.

<sup>21</sup> *Id.* at 578.

<sup>22</sup> See WALDRON, LAW AND DISAGREEMENT, *supra* note 4, at 15.

the national discussion in which constitutional values are determined.<sup>23</sup> The significance of judicial contributions to national debate is to be assessed in the same terms as the significance of the contribution of any actor on the public scene. Name-recognition and direct causal effectiveness in changing public opinion are two factors to be considered, but certainly not the only factors.

Waldron and Guinier both understand politics as an agora in which political actors seek persuasively to articulate their polity's commitments and principles. Neither conceives politics as merely a natural phenomenon to be explained as the result of physical causes. We might say that Waldron and Guinier imagine politics as a dimension of the human lifeworld. Most persons, most of the time, inhabit a lifeworld of the kind invoked by Waldron and Guinier. Most persons would think it strange to say that what is most significant about parental relationships can be expressed in terms of the measurable effects produced upon children. Within the lifeworld, what matters is the texture and meaning of relationships. Most persons would think it odd to say that the only important aspects of conversations with friends are those that result in quantifiable changes in measurable opinions. Within the lifeworld, what matters is the texture and substance of dialogue.

Analogously, what Waldron and Guinier consider important about politics is the texture and meaning of the relationships among political actors, as well as the texture and substance of the values that emerge from public discussion. To the extent that we imagine courts as participating in that discussion, it is not prerequisite to their significance that they cause measureable changes in public opinion. It is not prerequisite to their significance that most Americans are able to identify judicial decisions. It is not prerequisite to their significance that courts be the necessary or sufficient cause of quantifiable alterations in political commitments.

Of course if legal scholars do wish to advance causal claims, they ought to justify such claims by the best means available to the academic community. Where such claims are testable by the methodology of social science research, which is to say where they are reducible to quantifiable variables, pride of place might well devolve to the forms of reasoning that Rosenberg advances.<sup>24</sup> But Rosenberg's obsession with social science methodology leads him to misinterpret the nature of Guinier's arguments. Those who know only how to hammer frequently perceive in the world only nails.

The point can be illustrated by Rosenberg's discussion of Guinier's use of the word "authorize."<sup>25</sup> Rosenberg interprets Guinier as claiming that the "authorization" of the Court is a necessary or sufficient cause for various forms of social mobilization; he even reads her to argue that social mobilization cannot occur without the "permission" of the Court.<sup>26</sup> But given Guinier's

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<sup>23</sup> Guinier, *supra* note 1, at 119.

<sup>24</sup> Rosenberg, *supra* note 8, at 569.

<sup>25</sup> *Id.* at 573 (quoting Guinier, *supra* note 1, at 32, 39, 42, 58, 90, 114, 118).

<sup>26</sup> *Id.*

well-known commitment to social activism, this is a most implausible interpretation of her position. It is much more likely that Guinier is instead using the concept of “authorization” to describe forms of dialogic interaction that have little or nothing to do with causal claims of the kind privileged by Rosenberg.

Consider the question of why citizens fight tooth and nail to insert planks into the platforms of the national parties. The platforms are at best symbolic prizes; their causal impact on the world is probably negligible. Why, then, does it matter to citizens what their parties believe and affirm? One likely explanation is that endorsement by a major party can sometimes be regarded as endowing principles with authority, legitimation, and status, even if the endorsements are not well known and do not cause measurable changes in public opinion. We could even say that such endorsements “authorize” principles, although of course Rosenberg would be perfectly correct to observe that social activists do not need any such official authorization in order to pursue their independent political goals. The endorsement of a major party might be important in the same sense that the endorsement of a Nobel Prize winner might be important.

Used in this way, the concept of “authorization” refers to a texture of meaning. I interpret Guinier to make a claim of this kind when she writes that the opinions of a Justice can confer a kind of authorization that might matter to social activists.<sup>27</sup> She is referring to the fact that the endorsement of a Supreme Court Justice carries weight, even if it is not widely known. She is making a judgment that is qualitative, not quantitative.

Rosenberg does not consider this possible interpretation of Guinier because he is tone deaf to claims that register within the lifeworld of meaning, as distinct from the scientific world of cause and effect. Rosenberg’s misinterpretation does signal that a serious question of vocabulary faces those of us who, like Guinier, conceive values in both law and politics as emerging from struggles for meaning in the public sphere.<sup>28</sup> We need a language capable of describing relationships among political actors in ways that are true to the lived experience of such agents without being misunderstood as making claims that are merely causal. Arguments about cause and effect can surely be relevant to assessing the plausibility of the descriptions we offer, but these descriptions must be understood in the first instance as qualitative rather than causal.

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<sup>27</sup> Guinier, *supra* note 1, at 58-59 (suggesting that dissenting opinions “authorize ordinary people to see themselves as members of a constitutional community with power to reinterpret or remake the law”).

<sup>28</sup> See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007); Robert Post, *The Supreme Court, 2002 Term – Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 10 (2003); Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 240 (2008).

Rosenberg is right to argue that if we are concerned with the question of how legal values arise in the lifeworld of politics,<sup>29</sup> and if we conceive courts as participants in that lifeworld, then we ought not to be captured by a juricentric focus. But he is simply wrong to assert that “[i]f scholars want to understand the capacity of the Justices to influence democratic deliberation, they need to focus on that deliberation and on social movements, not on the Court.”<sup>30</sup> It would be a mistake to remedy a framework that is too juricentric by substituting a framework that altogether fails to take account of courts.

If the object of our research is the dialogue between law and politics, it is necessary to focus *both* on courts *and* on the deliberation inspired by social movements. Guinier’s project, like my own, is to examine the relationship between courts and political deliberation in terms that respect the lifeworld of politics.<sup>31</sup> This project is not immune from critique based upon hard causal data. But any such critique must recognize that our project entails propositions about the dialogue between politics and law that can not be *reduced* to assertions testable within the causal methods of social science research. The project entails understanding the dialogue between politics and law in ways that transcend the reach of quantifiable variables and that require the use of qualitative concepts such as “inspiration,”<sup>32</sup> “persuasion,”<sup>33</sup> “provocation,”<sup>34</sup> “legitimation,”<sup>35</sup> and so on.

It cannot be a useful critique of this approach to flatten it to the vocabulary and presuppositions of an alien and scientific discipline. Academic imperialism of this kind ought to be long dead and buried.

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<sup>29</sup> Rosenberg, *supra* note 8, at 573-74.

<sup>30</sup> *Id.* at 564.

<sup>31</sup> Guinier, *supra* note 1, at 12.

<sup>32</sup> *Id.* at 14.

<sup>33</sup> *Id.* at 132.

<sup>34</sup> *Id.* at 55.

<sup>35</sup> *Id.* at 111.

